

The Honorable Judge John C. Coughenour

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
 v.)
 KYLE GIANIS,)
)
 Defendant.)
 _____)

Cause No. No. CR04-334JCC

**Defendant's Memorandum in Support
of Cross Examination of Witness Youngberg**

Comes now the defendant, Kyle Gianis, through his attorney, Peter A. Camiel, and submits this memorandum in support of his being allowed to cross examine witness Youngberg regarding his mental condition presently, and at the time of the offense, and his use of prescribed psychiatric medications presently and at the time of the offense.

Background

Witness David Youngberg is one of two key witnesses for the government in its case against defendant Kyle Gianis. Youngberg entered a plea of guilty to a reduced charge of misprision of felony as a part of a plea agreement which required his cooperation against Kyle Gianis. Youngberg received a sentence of 21 months which he has served. He is presently released on supervision in British Columbia, Canada.

1 This Court, by order dated March 18, 2008, granted the government's motion to take
2 Youngberg's deposition pursuant to Federal Rule of Criminal Procedure 15. This Court has not yet ruled
3 whether or not Youngberg's deposition may be used at trial in lieu of his live testimony.

4 **Mr. Youngberg's Mental Health History**

5 In support of a motion for downward departure at the time of Youngberg's sentencing, his
6 attorneys argued that he suffered from diminished capacity at the time of the offense. To support this
7 argument, Youngberg presented a number of mental health expert reports including a report from Dr.
8 Eaves, a psychiatrist, who concluded that Mr. Youngberg suffered from severe mental illness which
9 "substantially compromised his cognitive (intellectual) ability and judgment" and thus "contributed
10 substantially to his being involved in criminal behavior." Dr. Eaves' report indicated that Mr. Youngberg
11 had a documented history of neurological disorder, depression, psychosis, and possible schizophrenia.

12 Mr. Youngberg's mother told the probation officer as is reflected in Mr. Youngberg's presentence
13 report that Mr. Youngberg is "extremely paranoid" and "that he sometimes hears voices and
14 hallucinates."

15 The offense in this case took place in March of 2004. In March of 2004, Mr. Youngberg was
16 being treated by Dr. Maskall, a psychiatrist. Dr. Maskall reported that he began seeing Mr. Youngberg
17 in May of 2000 and since that time, Mr. Youngberg's psychiatric presentation included chronic
18 depression, intermittent suicidality, agitation and brief psychosis. Mr. Maskall further indicated his
19 differential diagnosis included major depression with psychosis and schizophrenia. Dr. Maskall prescribed
20 and placed Mr. Youngberg on antidepressant medication in the fall of 1999, including Effexor (an
21 antidepressant) and Risperidone (an anti-psychotic). In a note dated February 24, 2004, about two weeks
22 before the charged offense, Dr. Maskall related that Mr. Youngberg had become more depressed and
23 withdrawn having a lack of motivation. Dr. Maskall's file also revealed there were several references to
24 his having ongoing mild paranoid ideation and suspiciousness.

25 In Dr. Maskall's letter to Mr. Youngberg's attorney dated March 25, 2004, he indicated that with
26 the passage of time, he has been inclined to lean toward schizophrenia as the primary diagnosis. He

1 indicates that Mr. Youngberg displays significant deficits and verbal linguistic skills, executive skills,
 2 abstract reasoning ability and impulse control. Due to Dr. Maskall's increased concern about Mr.
 3 Youngberg's status, Dr. Maskall wrote that he recommended an increase in dosage of medication,
 4 particularly the Risperidone. Risperidone is primarily used to treat schizophrenia and is particularly
 5 prescribed to treat symptoms such as hallucinations, delusions and disorganized thinking.

6 **Argument**

7 "The main and essential purpose of confrontation is to secure for the opponent the opportunity
 8 of cross examination." Davis v. Alaska, 415 U.S. 308, 315-316 (1974). "Cross examination is the
 9 principle means by which the believability of a witness and the truth of his testimony are tested." *Id.* at
 10 315. In Davis v. Alaska, the Supreme Court repeated the long established general rule that "the cross
 11 examiner is not only permitted to delve into the witness's story to test the witness's perception and
 12 memory, but the cross examiner has traditionally been allowed to impeach, i.e., discredit, the witness."
 13 Davis, 415 U.S. at 316. Davis requires that a defendant be allowed to test a witness's perceptions and
 14 memory via direct means, such as flaws in the witness's story or impeachment evidence, and to attack
 15 directly the witness's perceptions and memories of the very events at issue, arguing that his ongoing
 16 psychiatric condition calls into question his account of the events.

17 A number of courts have concluded that a defendant is permitted to delve into a witness's
 18 psychiatric condition if that condition was present at the time of the event to which the witness is
 19 testifying. For example, in Hargrave v. McKee, No. 05-1536 (6th Cir. Sept. 27, 2007), an unpublished
 20 decision, the Sixth Circuit Court of Appeals granted a state habeas petition based upon an unreasonable
 21 limitation on cross examination violating the defendant's 6th amendment right to confrontation where the
 22 trial court limited cross examination of the state's key witness regarding her psychiatric condition. In
 23 Hargrave v. McKee, the court stated:

24 "We would have no difficulty concluding that the confrontation clause guaranteed
 25 Hargrave the right to cross examine Warner, the sole eyewitness against him, regarding
 26 Warner's possible delusions and other mental limitations affecting her ability accurately
 to perceive and recall the events at issue. Unlike a general attack on credibility,
 Hargrave's proposed cross examination did not seek merely to demonstrate that Warner's

1 past behavior indicated she might be a person who was more willing to lie under oath than
 2 the average person. Rather, Hargrave's proposed cross examination, if successful, raised
 3 a strong possibility that Warner's psychiatric condition rendered her testimony unreliable
 4 regarding the very events at issue and, accordingly, was more similar to the possibility of
 5 unreliability raised by questions of motive or bias than to that raised by questions of
 6 general character for truthfulness."

7 In United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983), conviction was reversed once
 8 again for an improper restriction on the defendant's right to cross examine a witness regarding his
 9 psychiatric condition. In Lindstrom, the court stated:

10 "Certain forms of mental disorder have high probative value on the issue of credibility.
 11 Although the debate over the proper legal role of mental health professionals continues
 12 to rage, even those who would limit the availability of psychiatric evidence acknowledge
 13 that many types of 'emotional or mental defect may materially affect the accuracy of
 14 testimony; a conservative list of such defects would include the psychosis, most of all
 15 neurosis, defects in the structure of the nervous system, mental deficiency, alcoholism,
 16 drug addiction, and psychopathic personality.' . . . Mental illness may tend to produce bias
 17 in a witness's testimony. A psychotic's veracity may be impaired by lack of capacity to
 18 observe, correlate or recollect actual events. A paranoid person may interpret a reality
 19 skewed by suspicions, antipathies or fantasies. A schizophrenic may have difficulty
 20 distinguishing fact from fantasy and may have his memory distorted by delusions,
 21 hallucinations and paranoid thinking. A paranoid schizophrenic, though he may appear
 22 normal in his judgment on matters outside his delusional system may remain intact, may
 23 harbor delusions of grandeur or persecution that grossly distort his reactions to events."

24 Similarly, in United States v. Phelps, 733 F.2d 1464 (1984), the court affirmed a conviction where
 25 the defendant complained that the trial court improperly limited cross examination about a witness's
 26 psychiatric treatment some 14 years before the critical events testified about. The court noted, in
 27 affirming the conviction, that the trial court:

28 "allowed cross examination of [the witness] concerning his 'psychiatric condition or
 medical condition' from as long as 5 years before the time of the critical events about
 which he testified on direct and up to the day of his testimony. The court limited the
 scope of cross examination to exclude only events deemed so remote in time as to be
 irrelevant to [the witness's] credibility or ability to remember. [The witness] was available
 for extensive cross examination by questions on his psychiatric condition relevant to his
 ability to observe and remember during all the years mentioned in his testimony. . . This
 was more than adequate to place before the jury [the witness's] mental conditions at all
 times (1981 to 1982) pertinent to this case and to the critical events about which he
 testified."

See also, United States v. Pommerening, 500 F.2d at 92, 100 (10th Cir.), cert. den. 419 U.S. 1088
 (1974).

1 In Greene v. Wainwright, 634 F.2d 272 (5th Cir. 1981), the court reiterated that “where the
2 witness the accused seeks to cross examine is the ‘star’ government witness, providing an essential link
3 in the prosecution’s case, the importance of full cross examination to disclose possible bias is necessarily
4 increased.” The court went on to state that the readily apparent principle is that the jury should, within
5 reason, be informed of all matters affecting a witness’s credibility to aid in the determination of the truth.
6 It is just as reasonable that a jury be informed of a witness’s mental incapacity at the time about which
7 he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or
8 hearing.

9 Conclusion

10 The witness herein, Youngberg, argued at his own sentencing that he suffered from diminished
11 capacity at the time of the offense. There is substantial evidence that he suffered from a mental
12 impairment and was on significant psychiatric medications at the time of the offense. The anti-psychotic
13 medication that the witness was receiving commenced three and a half years before the offense and was
14 continuing up through the time that he was involved in this offense. Questions during cross examination
15 concerning medication that Mr. Youngberg was on at the time of the offense and at the time of trial or
16 his deposition as well as his psychiatric condition at the time of the offense and at the time of trial or
17 deposition should be permitted so that the jury has a full understanding of matters which may have
18 affected Mr. Youngberg’s ability to perceive and understand events as well as matters going to his
19 motives or bias. These are fundamental aspects of cross examination and confrontation which the
20 defendant should be permitted to explore.

1 DATED this 22nd day of May, 2008.

2 Respectfully submitted,

3 /s/ Peter A. Camiel
4 Peter A. Camiel, WSBA #12596
5 Attorney for Kyle Gianis
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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2008 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s) and plaintiff.

/s/ Peter A. Camiel, WSBA #12596